

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

MJT SECURITIES, LLC,

Plaintiff - Appellant,

v.

TORONTO-DOMINION BANK; et al.,

Defendants - Appellees.

No. 04-16362

D.C. No. CV-03-03815-CW

MEMORANDUM^{*}

Appeal from the United States District Court
for the Northern District of California
Claudia Wilken, District Judge, Presiding

Argued and Submitted April 5, 2006
San Francisco, California

Before: THOMPSON, BERZON, and CALLAHAN, Circuit Judges.

MJT Securities, LLC (“MJT”) appeals the dismissal on the pleadings of its action against the Toronto-Dominion Bank (“TD Bank”). MJT alleged that it had a 30% interest in a Joint Venture with JSS Investments, LLC (“JSS”) and that when

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

JSS sold the Joint Venture to TD Bank, TD Bank helped structure the sale so that MJT received less than the fair value of its interest. MJT's claims against JSS were resolved in arbitration. MJT, however, filed a complaint in the district court. After its initial complaint was dismissed, MJT filed a first amended complaint alleging causes of action against TD Bank for interfering with its prospective economic advantage and for aiding and abetting a breach of fiduciary duty.¹

The district court granted TD Bank's motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) finding that (1) the claim for interference failed because MJT could not show an existing economic relationship with a probability of future economic benefit, (2) the aiding and abetting claim failed to adequately allege that TD Bank was furthering its own advantage, and (3) MJT could not seek attorneys' fees because TD Bank was a joint tortfeasor with JSS. In addition, the district court ruled that MJT could seek punitive damages even though it did not seek actual damages. MJT filed a timely appeal.

We affirm the district court's rulings that MJT could not state a claim for interference or seek attorneys' fees, but that it could seek punitive damages. We reverse the district court's determination that MJT failed to adequately plead a

¹ As the parties are familiar with the underlying facts, we recount them only to the extent necessary to explain our decision.

cause of action for aiding and abetting a fiduciary's breach of trust.

We have held that a Rule 12(b)(6) dismissal is reviewed de novo, "accepting as true all well-pleaded allegations of fact in the complaint and construing them in the light most favorable to the plaintiffs." *Zimmerman v. City of Oakland*, 255 F.3d 734, 737 (9th Cir. 2001).

(1) Our review of the record reveals that the district court properly dismissed MJT's claim of interference with a prospective economic advantage. Under applicable California law, the first element of a claim for interference with prospective economic advantage is a showing of "an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff." *Pac. Gas & Elect. Co. v. Bear Stearns & Co.*, 50 Cal. 3d 1118, 1126 n.2 (1990). As noted by the district court, to meet this first element of a claim for interference with prospective economic advantage, MJT had to show that it anticipated future economic benefit from its relationship with JSS. MJT, however, pleaded that in June 2001, JSS forced MJT out of the Joint Venture without formally terminating the Joint Venture. MJT contended that JSS's action created a constructive trust in MJT's favor, and that MJT was accordingly entitled to the value of its interest in the Joint Venture either as of the imposition of the constructive trust or when the Joint Venture was sold by JSS, whichever was

greater. Under this approach, MJT's relationship with JSS ceased with the imposition of the constructive trust. Accordingly, MJT's claim of constructive termination and the subsequent arbitration award against JSS precluded MJT from showing a "prospective economic advantage [that] would have been realized but for defendant's interference." *Youst v. Longo*, 43 Cal. 3d 64, 71 (1987).

(2) Under applicable California law, a claim against a third party for aiding and abetting a fiduciary's breach of trust requires an allegation that the defendant acted for the purpose of advancing its own interest. *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 68 Cal. App. 4th 445, 464 (1998).

Specifically, the court in *Atascadero* held that "trust beneficiaries may sue third parties who participated with a trustee in alleged breaches of trust, as long as the third parties' participation was both active and for the purposes of advancing *their own interests* or financial advantages." *Id.* (emphasis added). The district court determined that MJT's allegation that TD Bank did not benefit financially from the alleged sham sale precluded any claim that TD Bank acted for the purpose of advancing its own interest. We disagree. We read *Atascadero* as allowing MJT to plead a claim for aiding and abetting a fiduciary's breach of trust based on

allegations that the defendant advanced interests other than financial advantage.²

Accordingly, the dismissal of MJT's second cause of action is vacated.³

(3) Our vacation of the district court's dismissal of MJT's second cause of action leads us to consider the district court's rulings on MJT's claims for attorneys' fees and punitive damages. The general rule in California is that in tort cases, attorneys' fees are to be paid by the party employing the attorney. *Prentice v. N. Am. Title Guar.*, 59 Cal. 2d 618, 620 (1963). An exception exists for instances where the tort of another has forced a person to sue a third party to protect his or her interests. *Id.* MJT contends that TD Bank is liable "for the attorneys' fees MJT was forced to expend to recover anything close to the true value of the [Joint Venture] in arbitration proceedings with JSS."

MJT's claim for attorneys' fees under the California's "tort of another" doctrine fails because California courts have held that attorneys' fees under that doctrine are not available against joint tortfeasors. *Vacco Indus. v. Van Den Berg*, 5 Cal. App. 4th 34, 57 (1992). The *Vacco* court held:

² Our determination is not based on the decision in *Casey v. U.S. Bank National Assn.*, 127 Cal. App. 4th 1138 (2005). On remand, the district court may consider the impact, if any, of *Casey* on this case. MJT's motion for leave to file supplemental briefs addressing *Casey* is denied.

³ This disposition moots MJT's objections to the district court's denial of its motion to amend its complaint.

The rule of *Prentice* was not intended to apply to one of several joint tortfeasors in order to justify additional attorney fee damages. If that were the rule there is no reason why it could not be applied in every multiple tortfeasor case with the plaintiff simply choosing the one with the deepest pocket as the "*Prentice* target."

Id. Here, because MJT has pled that TD Bank and JSS were joint tortfeasors, it may not recover attorneys' fees under California's "tort of another" doctrine.⁴

(4) TD Bank urges that the district court's judgment can be affirmed on the alternate ground that MJT failed to plead any recoverable damages. MJT's first amended complaint sought only punitive or exemplary damages and attorneys' fees and costs.⁵ As we have held that MJT cannot recover attorneys' fees, we turn to TD Bank's claim that MJT cannot recover punitive damages.

TD Bank argues that under California Civil Code Section 3294, actual damages are an absolute predicate to punitive damages. We, however, agree with the district court that in light of *Weiss v. Blumenkranc*, 61 Cal. App. 3d 536, 543

⁴ MJT's reliance on *Vanguard Recording Soc'y, Inc. v. Fantasy Records, Inc.*, 24 Cal. App. 3d 410 (1972), is misplaced. There the plaintiff was forced to sue third-party distributors of a certain record because they failed to cease such distributions when notified. Thus, the distributors committed a separate and distinct tort from that committed by the producer who wrongfully made the record. Here, MJT alleged that TD Bank and JSS participated in a single scheme.

⁵ A prior order by the district court held that MJT was collaterally estopped from seeking actual damages. That ruling is not challenged in this appeal.

(1976), MJT may seek punitive damages in this case. The *Weiss* court held that while it was “well established that actual damages cannot be awarded in absence of a prayer for compensatory damages,” it “does not follow that punitive damages cannot be granted in absence of a prayer for compensatory damages and a recovery thereon.” *Id.* at 542. The *Weiss* court noted that in *Topanga Corp. v. Gentile*, 249 Cal. App. 2d 681 (1967), punitive damages were sought, but actual damages were neither prayed for nor recovered. *Weiss*, 61 Cal. App. 3d at 543. Nonetheless, the appellate court allowed for punitive damages because the requirement of actual damages “imposed by section 3294 is simply the requirement that a *tortious act be proven if punitive damages are to be assessed.*” *Id.* (citing *Topanga*, 249 Cal. App. 2d at 691).

MJT alleges that TD Bank did commit a tortuous act. Thus, at least at the pleadings stage, under California law as set forth in *Weiss*, it appears that MJT may state a claim for punitive damages even if it cannot claim actual damages.

For the foregoing reasons, the district court’s dismissal of MJT’s first cause of action for interference with prospective economic advantage and its holding that MJT may not recover attorneys’ fees under California’s tort of another doctrine are affirmed, and its dismissal of MJT’s second cause of action for aiding and abetting breach of fiduciary duty is vacated. Also the district court’s determination that

under California law MJT may seek punitive damages is affirmed. The court, in its discretion, denies TD Bank's Request for Judicial Notice. The district court's order is **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED** for further proceedings.